U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THERESA M. IANNIELLI-HUBER and U.S. POSTAL SERVICE, POST OFFICE, Takoma, WA

Docket No. 99-360; Submitted on the Record;
Issued July 24, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective March 1, 1995 on the grounds that she had no disability due to her August 30, 1993 employment injury after that date; and (2) whether the Office properly denied appellant's request for a second hearing.

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective March 1, 1995 on the grounds that she had no disability due to her August 30, 1993 employment injury after that date.

Under the Federal Employees' Compensation Act,[1] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[2] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

On August 30, 1993 appellant, then a 33-year-old clerk, sustained employment-related cervical and lumbar subluxations. She received compensation for periods of disability. By decision dated March 1, 1995, the Office terminated appellant's compensation effective that date on the grounds that she had no disability after that date due to her August 30, 1993 employment injury. The Office based its opinion on the January 6, 1995 joint report of Dr. Michael C.

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[3] *Id.*

[4] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

Bidgood and Dr. George P. Delyanis, a Board-certified orthopedic surgeon and neurologist, respectively, to whom the Office referred appellant for further evaluation.

Appellant requested a hearing before an Office hearing representative and a hearing was held on August 29, 1995. By decision dated and finalized November 9, 1995, the Office hearing representative denied modification of the Office's March 1, 1995 decision. By decision dated August 4, 1997, the Office again denied modification of its Office's March 1, 1995 decision.[5] On August 20, 1997 appellant requested a hearing before an Office hearing representative and, by decision dated January 20, 1998, the Office denied appellant's request for a second hearing. The Office reissued the November 9, 1995 decision of the Office hearing representative in order to preserve appellant's appeal rights.[6]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Drs. Bidgood and Delyanis, the Office referral physicians. The January 6, 1995 report of Drs. Bidgood and Delyanis establishes that appellant had no disability due to her August 30, 1993 employment injury after March 1, 1995.

In their report, Drs. Bidgood and Delyanis diagnosed marked functional overlay on examination, historical cervicodorsal strain and documented degenerative disc disease of the lumbar spine, preexisting and unrelated to the industrial injury of August 30, 1993. They noted that the findings on examination were primarily functional without objective correlation and represented a normal neuromuscular examination. Drs. Bidgood and Delyanis indicated that, given the nature of appellant's injury, ample time had elapsed for it to resolve itself. They noted that appellant did not require any particular work restrictions.

The Board has carefully reviewed the opinion of Drs. Bidgood and Delyanis and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Their opinion is based on a proper factual and medical history in that they had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Drs. Bidgood and Delyanis provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing, and reached conclusions regarding appellant's condition which comported with this analysis.[7] Drs. Bidgood and Delyanis provided medical rationale for their opinion by explaining that appellant exhibited limited findings on examination and had a type of injury which would have resolved on its own. They explained that appellant's continuing problems could be explained by her underlying condition and functional overlay.

[5] After the Office's November 9, 1995 decision, appellant's case record was lost; the file was reconstructed prior to the issuance of the Office's August 4, 1997 decision and contains all the relevant documents.

[6] In July 1997, appellant filed a claim for an employment-related emotional condition and, by decision dated April 28, 1998, the Office denied appellant's claim on the grounds that she did not submit sufficient evidence in support thereof. She has not appealed this decision to the Board.

[7] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

The record contains reports in which attending physicians suggested that appellant had continuing employment-related disability after March 1995, but these reports are of limited probative value on the relevant issue of the present case in that they do not provide adequate medical rationale in support of their conclusions on causal relationship.[8] In reports dated April 4 and August 2, 1996, Dr. Kenneth Bakken, an attending osteopath, indicated that appellant had employment-related fibromyalgia syndrome and cervical dystonia. The Office has not accepted these conditions as employment related; Dr. Bakken did not provide adequate medical rationale explaining how these conditions could be employment related.[9] The record contains other medical reports suggesting that appellant has employment-related fibromyalgia but they also are lacking in adequate medical rationale. In a report dated August 22, 1995, Dr. Kevin Schoenfelder, an attending Board-certified orthopedic surgeon, indicated that appellant had a lumbar radiculopathy, but he did not provide a clear opinion that this condition was employment related or caused disability.[10]

The Board further finds that the Office properly denied appellant's request for a second hearing.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[11] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[12]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[13] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a

[8] *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

[9] Dr. Bakken based his cervical dystonia diagnosis on a July 19, 1996 report of Dr. Patrick Hogan, another attending osteopath. Dr. Hogan did not adequately explain why the condition was employment related.

[10] Appellant submitted additional evidence after the Office's January 20, 1998 decision, but the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

[11] 5 U.S.C. § 8124(b)(1).

[12] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[13] *Henry Moreno*, 39 ECAB 475, 482 (1988).

hearing,[14] when the request is made after the 30-day period for requesting a hearing,[15] and when the request is for a second hearing on the same issue.[16]

In the present case, appellant had already had a hearing on the same issue for which she requested a second hearing. Hence, the Office was correct in stating in its January 20, 1998 decision that appellant was not entitled to a second hearing as a matter of right.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its January 20, 1998 decision, properly exercised its discretion by stating that there had been no material change in appellant's case since the last hearing; the issue of the case was medical and could be resolved by submitting medical evidence in connection with a reconsideration request; and that no purpose would be served by holding a second hearing. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[17] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a second hearing which could be found to be an abuse of discretion.

For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

[14] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[15] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[16] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[17] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decision of the Office of Workers' Compensation Programs dated January 20, 1998 is affirmed.

Dated, Washington, D.C.
July 24, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member